IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Abdul Latif & ors. vs. Nagar Vikas Pranyas, Udaipur

S.B. Civil Second Appeal No.179/1983 against the judgment and decree dated 25.10.1983 passed by the learned Addl. District Judge, Udaipur in Civil Appeal No.35/1981

Date of Judgment: March 07, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

REPORTABLE

Mr. D.R. Bhandari for the appellants.
Mr. Lalit Kawadia for the respondent.

BY THE COURT:

The plaintiffs are aggrieved against the dismissal of his suit for permanent injunction against respondent Urban Improvement Trust, Udaipur by the trial court by judgment and decree dated 22.11.1979. The appeal against the judgment and decree of the trial court dated 22.11.1979 too was dismissed on 25.10.1983. However, while dismissing the appeal, the appellate court observed that since the plaintiffs are in old possession of the suit property, therefore, it is expected from the U.I.T., Udaipur to follow the due process of law in case they found it appropriate to evict the plaintiffs from the suit property.

The grievance of the appellant-plaintiffs is that the appellants-plaintiffs acquired title, at least by long settled possession, therefore, they cannot be evicted from the suit property by any one. By allowing the U.I.T., Udaipur to evict the appellants-plaintiffs, the courts failed in recognising plaintiffs' title in the property in dispute.

The plaintiffs' case is that the plaintiffs are the owners of the property described in para no.1 of the plaint which is situated in the area of the city of Udaipur. According to the plaintiffs, the plaintiffs' houses are situated in the area described by the neighbourhood given in para no.1 of the plaint. The property and the houses are in possession of the plaintiffs since about more than 105 years,i.e. from the time of their ancestors. The properties said to be enclosed by the boundary wall. On 12.4.1970, the officers of the U.I.T., Udaipur along with several employees came with police and demolished northern and eastern boundary wall of the plaintiffs' property and also demolished one latrine situated in the western cover. One house situated in eastern side was also demolished. The persons who were residing in the houses suffered some injuries also. But according to the plaintiffs, they were not dispossessed from the property. They apprehended that at any time they may be dispossessed, therefore, they filed the suit for injunction on 17.4.1970.

The suit was contested by the defendant U.I.T., Udaipur. The

defendant-respondent denied the title of the plaintiffs for the house in dispute. However, the defendant admitted the existences of houses of the plaintiffs but with a plea that they were constructed illegally. It is also pleaded that the plaintiffs whenever tried to encroach upon the land in dispute, they were prevented by the persons of the respondent-U.I.T. It is submitted that before taking action against the plaintiffs, notices were given to one of the plaintiff Noor Mohd. and when he did not remove his structure then the action was taken. In reply, it was specifically admitted that the dispute between the plaintiffs and the U.I.T., Udaipur is going on since long and after looking into the entire record, the defendant reached to the conclusion that the possession of plaintiff Noor Mohd. Is illegal. It is also pleaded that the plaintiff has not sought decree for declaration of his title, therefore, the suit is not maintainable.

Only two issues were framed by the trial court, one is to the effect that whether the plaintiffs are owners and are in possession of the property and second, whether the suit for mere injunction without seeking relief of declaration is not maintainable.

The plaintiffs produced as many as seven witnesses and several documents in support of their case, which includes a *Patta* of the Samvat Year 1922 alleged to have been issued by the Government of Mewar (Ex.1) and several notices issued by the various authorities time

to time giving warning to the plaintiff Noor Mohd.'s predecessors that their houses are in dilapidated condition and may fell down so they should repair and report. The trial court held that the plaintiffs are in possession of the property in dipsute and that possession is since long but since the plaintiffs came with positive case that they are owner of the property and they failed to prove the ownership, therefore, the plaintiffs are not entitled for relief of injunction. The appellate court was also of the view that the plaintiffs failed to prove their title but since they proved their possession, therefore, they can be evicted only by following due process of law. Even after observing so, the appellate court dismissed the appeal of the appellant-plaintiffs.

According to the learned counsel for the appellants, the suit of the plaintiffs was dismissed by the impugned judgment and decree dated 22.11.1979 and the appeal too was dismissed despite the fact that the appellate court itself observed that the plaintiffs cannot be dispossessed from the property in dispute without following due process of law. In that situation, the appellate court should have allowed the appeal and should have passed the specific decree restraining the respondent-U.I.T., Udaipur from evicting the plaintiffs from the suit property. It is also submitted that the two courts below committed serious error of law in holding that the plaintiffs are not owner of the property and further committed serious error of law in not taking note

of the statutory provisions of Section 110 of the Evidence Act which provides that if possessions is proved then presumption about the title can be drawn in favour of the person who is in possession and it is duty of the other party who is challenging title of a person in possession, to prove that the title does not vest in that party in possession. The learned counsel for the appellant also submitted that the suit for mere injunction is maintainable and it is not necessary that in suit for injunction, relief of declaration of title is condition precedent. For that, the learned counsel for the appellants relied upon the judgment of the Gauhati High Court delivered in the case of Haladhar Sarma vs. Assam Go-Seva Samity reported in AIR 1979 Gauhati 23. In support of his argument for the presumption of title in favour of the person in possession, the learned counsel for the appellants relied upon the judgment of the Hon'ble Apex Court delivered in the case of Chief Conservator of Forests, Govt. of A.P. vs. Collector and others reported in AIR 2003 SCW 1251. It is also submitted that the plaintiffs can maintain the suit on the strength of possession only as held by the Hon'ble Apex Court in the case delivered in M.Kallappa Setty v. M.V.Lakshminarayan Rao reported in AIR 1972 SC 2299. The learned counsel for the appellants also relied upon the judgment of this Court delivered in the case of Mohan Lal vs. The Urbam Improvement Trust, Jodhpur reported in1978 RLW 72.

The learned counsel for the respondent vehemently submitted that the two courts below after considering the oral as well documentary evidence held that the plaintiffs failed in proving their title to the property. This finding has been recorded after appreciation of the evidence and it will not be within the permissible scope of Section 100, C.P.C. to interfere in such finding of fact. It is also submitted that the finding has not been vitiated because of any misreading of evidence or for any other lawful reason. Apart from it, according to the learned counsel for the respondents, the *Patta* produced by the plaintiffs has no connection with the property in dispute. The *Patta* of the Samvat Year 1922 set up by the plaintiffs clearly discloses that the property for which said document may have relation is having river in two sides and it has a well and within it is a big land having measurement of 6 bighas. Whereas from the neighbourhood given by the plaintiffs in the plaint, it is clear that the plaintiffs alleged property is surrounded by the houses in three sides. There is no river or even water pond near the property in dispute or within it. It is also submitted that the notices which are relied upon by the appellants-plaintiffs disclose only that one of the house was in bad condition which was of Ajeem Khan but it is not proved that that house is situated within the neighbourhood given in the plaint.

The learned counsel for the respondent also heavily relied upon

the judgment of the Hon'ble Apex Court delivered in the case of Yamuna Nagar Improvement Trust vs. Khatiati Lal reported in 2005(6) SRJ 377, wherein Hon'ble the Apex Court held that for relief of injunction under Order 39 Rule 1 and 2 C.P.C, the plaintiff must be owner and in possession of the disputed property, otherwise the suit is liable to be dismissed. The learned counsel for the respondents also submitted that presumption under Section 110 of the Evidence Act of the title can be drawn only when the fact discloses no title in any party. In present case, the plaintiff claimed that he is owner of the property by virtue of *Patta* and failed in proving so, therefore, the plaintiffs cannot fall back upon their possessory title, nor can take help of Sec.110 of the Evidence Act. In the present suit, the defendant is claiming that the defendant is owner of the property and the property is vesting in the defendant. The learned counsel for the respondent yet relied upon the judgment of this Court delivered in the case of Bhuraji & another vs. Urban Improvement Trust, Alwar and another reported in 1996(3) WLC (Raj.) 155 wherein this Court took a view that in case of pre-existing dispute about title, mere suit for injunction is not maintainable and in this case, the plaintiffs already admitted that the defendant is disputing their title.

I considered the submissions of the learned counsel for the parties and perused the record.

The appeal was admitted on 16.12.1983 after framing the

following substantial questions of law:-

> *"(1) Whether the courts below were right in holding that the mere suit for injunction without a prayer for declaration of title was not maintainable ?*
>
> *(2) Whether the learned Addl. District Judge has failed to consider the evidence regarding title?"*

It is true that the two courts below held that the plaintiffs failed to prove their title for the property in dispute but at the same time, both the courts below categorically held that the plaintiffs are in possession of the suit property since long. It will be worthwhile to mention here that the plaintiffs produced *Patta* (Ex.1) of the Samvat Year 1922. However, the neighbourhood given in that *Patta* are not as disclosed in the plaint. There is every possibility that by the passes of time, neighbourhood may have changed but the *Patta* contains very many facts which are entirely different which are pleaded in the plaint while describing the property. Therefore, the two courts rightly did not rely upon the said *Patta* Ex.1 for holding the plaintiffs owner of the disputed properties.

The other documents which are the decisions dated 5.5.1927 (Ex.2), the Notices issued by the City Corporation dated 16.2.1950(Ex.5) and 24.2.1950 (Ex.3). These are the documents which were issued to the father of the plaintiff Noor Mohd. These notices Ex.3 and Ex.5 are the notices containing the fact that the house of Ajeem Khan father of Noor

Mohd. is in bad condition and may fell down. In the decision Ex.2 dated 5.5.1927, there is reference of *Patta* of the Samvat Year 1922 and of issuing place Kankroli. Not only this but even the Municipal Board of Udaipur gave notice to one of the plaintiffs Noor Mohd. on 15.7.1981 (Ex.4) wherein it is mentioned that the house of Noor Mohd. is situated in Alipura area and its number is given as 11 and it is stated that the said house may fell at any point of time, therefore, he should repair it and inform the Municipal Board, Udaipur and the same notice was issue earlier, as back as in the year 1950 (Ex.5). The plaintiffs also produced the house tax receipts Ex.7 to 12 by which the house tax was recovered from the plaintiff Noor Mohd. Ex.7 is dated 30.9.1976. Apart from it, there is one more document of the year 1962, i.e. 10.9.1962(Ex.8) in relation to the house of the plaintiff Noor Mohd. and further more, a construction permission dated 4.11.1963 issued in the name of plaintiff Noor Mohd. S/o Ajeem Khan. In view of these documents, not only the possession of the plaintiffs is fully proved but that possession appears to be long, peaceful and settled possession and decades old and that is from the period prior to even constitution of the U.I.T., Udaipur. It is not a case of tress-pass over the government land or over the land vesting in U.I.T., Udaipur. In view of the above, a presumption of vesting title should have been drawn under Section 110 of the Evidence Act in the person in possession. That presumption could have been

rebutted by the U.I.T., Udaipur by showing vesting of title in the U.I.T., Udaipur itself or U.I.T., Udaipur could have rebutted that presumption even by showing title in any third party including in State. Hon'ble the Apex Court in the judgment delivered in the case of Nair Service Society Ltd. vs. K.C.Alexander and others reported in AIR 1968 SC and relied upon by the learned counsel for the respondents, also held that the presumption of title can arise only where the facts disclose no title in **any party.** Meaning thereby it must come on record that title vests in any party other than the plaintiff to rebut the claim of presumption of title on the basis of settled possession. In this case, apart from the fact of old settled possession of the plaintiffs and their predecessors, the documents referred above, particularly Ex.2 to Ex.13, clearly shows that the title of the plaintiffs' house was never denied by even the predecessor of the U.I.T. Rather in those documents various authorities admitted that the houses are of the plaintiffs or plaintiffs' ancestors. In view of those admissions, it is too late for the U.I.T, to take a stand that the presumption cannot be drawn in favour of the plaintiffs about title to the property because the title was disputed by the defendant U.I.T., Udaipur subsequent to documents of the year 1950. In view of the above, the judgment relied upon by the learned counsel for the respondent delivered in the case of Nair Service Society Ltd.(supra) is of no help to the defendant. Rather facts of the case shows that the

defendant- U.I.T. did not produce any evidence about vesting of title in U.I.T., Udaipur itself or in State or even in any third party. It is most likely that the defendant-U.I.T., Udaipur proceeded with assumption that despite long settled possession of the plaintiffs, the court will presume this particular land also vests in U.I.T., Udaipur because by statutory provision, Urban Improvement Act, 1959, all unoccupied government land stand vesting in Urban Improvement Trust constituted for Udaipur. Since the plaintiff proved his long and settled and peaceful possession over the property in dispute of more than 50 years and the defendant did not prove that it was government land by producing evidence so as to reach to defendant U.I.T., Udaipur at the time of its constitution or thereafter, presumption of title on the basis of possession is drawn in favour of plaintiffs under Section 110 of the Evidence Act.

Therefore, so far as the judgment relied upon by the learned counsel for the respondents of this Court delivered in the case of Bhurji (supra) is concerned, it may be sufficient to observe that the said judgment cannot be applied to the facts of this case where the respondent-U.I.T.'s predecessor, City Corporation and the Municipal Board did not dispute about title of the plaintiffs and, therefore, if no declaration was sought by the plaintiffs in this suit, even then on the strength of the actual physical possession and settled possession, the

plaintiffs' suit for injunction was maintainable. Said judgment cannot be applied to the cases where there is evidence of not disputing the title of the plaintiffs in past when it could have been disputed. In the judgment of the Hon'ble Supreme Court delivered in the case of Yamuna Nagar Improvement Trust(supra), the Hon'ble Apex Court clearly held that the Hon'ble Apex Court is satisfied from the award that acquisition proceedings were in knowledge of the plaintiffs and the plaintiffs failed in proving that the land was not acquired by the State and the plaintiff did not sought any declaration of title, therefore, the plaintiff was not entitled to any relief. Said judgment has no application in the facts of this case.

In view of the above discussion, issue no.1 is decided in favour of the appellants and it is held that the suit was maintainable even when the plaintiffs came with the case that they are owner of the property and the two courts below declared that the plaintiffs failed to prove their title, the suit of the plaintiffs on the strength of his possession in the facts mentioned above and in view of Section 110 of the Evidence Act was maintainable.

Apart from above, it will be worthwhile to mention here that the first appellate court itself recognised the plaintiffs' right to remain in possession unless evicted by following due process of law. There was no reason for the first appellate court to not to grant the decree for

injunction against the defendants to the same effect of restraining them from evicting the plaintiffs from the suit property without following due process of law. That portion of the decree is not under challenge as the defendant-respondent did not choose to prefer appeal against that portion of the observation made by the first appellate court. The respondent rightly did not challenge that portion of the judgment and decree of the first appellate court because of the reason that the plaintiffs' suit on the strength of possession for injunction was maintainable and the defendant could not have forcibly evicted the plaintiffs from the suit property.

So far as issue no.2 is concerned, since the suit of the plaintiffs, in the facts of this case for grant of injunction could have been decreed on the basis of the old settled possession and declaration was not sought, therefore, this Court is not inclined to re-appreciate the evidence for the purpose of deciding whether title vests in the plaintiffs or not and no purpose will be served in view of the fact that the plaintiffs' title to the properties in dispute was never challenged by the U.I.T., Udaipur or its predecessors and it has been held that the plaintiffs and their predecessors were in possession of the properties since before 1950 and the defendant U.I.T. failed to rebut presumption drawn in favour of the plaintiffs of vesting of title in them under Section 110 of the Evidence Act, therefore, the substantial question of law no.2

is decided accordingly and it is held that the plaintiffs appellants though are not owner of the properties referred in the suit by virtue of any title deed in their favour and to that extent finding of first appellate court is affirmed but the two courts below ignored the material evidence on record and failed in drawing correct inference for the documents that the plaintiffs are in long settled possession of the properties in dispute and their title was never questioned by the respondent U.I.T. who it could have been disputed and further at the time of constitution of U.I.T., Udaipur the property was not unoccupied government land which could have vested in respondent-U.I.T.

In view of the above, the appeal of the appellants is allowed. The judgment and decree passed by the appellate court dated 25.10.1983 of the trial court dated 20.11.1979 are set aside. The suit of the plaintiffs appellants is decreed against the respondent U.I.T. The defendant respondent U.I.T., Udaipur is restrained from evicting the plaintiffs-appellants from the properties mentioned in the plaint and further restrained from interfering in the peaceful enjoyment of the said properties by the plaintiffs-appellant. No order as to costs.

(PRAKASH TATIA),J.

mlt.